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BEFORE THE

**Federal Communications Commission** RECEIVED

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
 )  
Amendment to the Commission's )  
Rules Regarding a Plan for Sharing )  
the Costs of Microwave Relocation )

WT Docket No. 95-157

DOCKET FILE COPY ORIGINAL

To: The Commission

OPPOSITION  
OF THE  
AMERICAN PETROLEUM INSTITUTE  
TO  
CERTAIN PETITIONS FOR RECONSIDERATION,  
CLARIFICATION AND/OR RULE MAKING

AMERICAN PETROLEUM INSTITUTE

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## **SUMMARY**

The American Petroleum Institute ("API") urges the Commission to deny the "Petition for Reconsideration or, in the Alternative, for Rulemaking" of AT&T Wireless Services, Inc., GTE Mobilnet, PCS PrimeCo, L.P., Pocket Communications, Inc., Western PCS Corporation and the Cellular Telecommunications Industry Association (collectively, "Petitioners"). Petitioners have not presented any justification for their request that the Commission upset its well-established relocation framework by requiring microwave incumbents either to vacate their 2 GHz frequencies by the end of the mandatory negotiation period or have their licenses automatically converted to secondary status at that time. Indeed, amendment of the relocation rules in the manner suggested by Petitioners would leave PCS licensees with little incentive to pay to relocate microwave incumbents during the involuntary relocation period. Further, the issues raised by Petitioners are not the proper subject of a petition for reconsideration, as they are outside the scope of this proceeding.

API also opposes the "Petition for Reconsideration and Clarification" of Omnipoint Communications, Inc. to the extent that it asks the Commission to declare that microwave incumbents who request "cash windfalls" during the mandatory negotiation period are acting in bad faith. The Commission has correctly determined that the question of bad faith depends on the particular facts and circumstances surrounding each microwave relocation and should therefore be assessed on a case-by-case basis.

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AMERICAN PETROLEUM INSTITUTE  
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CERTAIN PETITIONS FOR RECONSIDERATION,  
CLARIFICATION AND/OR RULE MAKING

The American Petroleum Institute ("API"), by its attorneys, pursuant to Section 1.429 of the Rules and Regulations of the Federal Communications Commission ("Commission"), respectfully submits this Opposition to certain Petitions for Reconsideration, Clarification and/or Rulemaking filed in response to the First Report and Order ("Order") adopted by the Commission in this matter on April 25, 1996.<sup>1/</sup>

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<sup>1/</sup> 61 Fed. Reg. 29679 (June 12, 1996).

## I. OPPOSITION

1. Specifically, and for the reasons set forth below, API opposes: (1) the "Petition for Reconsideration or, in the Alternative, for Rulemaking" ("Petition") of AT&T Wireless Services, Inc., GTE Mobilnet, PCS PrimeCo, L.P., Pocket Communications, Inc., Western PCS Corporation and the Cellular Telecommunications Industry Association (collectively, "Petitioners") that requests the Commission to require microwave incumbents either to vacate their 2 GHz frequencies by the end of the mandatory negotiation period or have their licenses automatically converted to secondary status at that time; and (2) the "Petition for Reconsideration and Clarification" of Omnipoint Communications, Inc. ("Omnipoint"), to the extent that it asks the Commission to deem it per se bad faith for microwave incumbents to request "cash windfalls" during the mandatory negotiation period.

**A. Modification of the Commission's Basic Involuntary Relocation Framework Is Unwarranted and Would Be Improper as a Procedural Matter**

2. As Petitioners acknowledge, the Commission's relocation rules currently provide that, before the license of a microwave incumbent will be amended to secondary status during the involuntary relocation period, the PCS licensee must: (1) guarantee payment of all costs of relocating the incumbent to comparable facilities; (2) complete all activities necessary for placing the new facilities into operation; and (3) build and test the replacement system. These requirements are the culmination of many months of careful deliberation by the Commission following extensive input from interested parties. As such, the rules strike a measured balance between the potentially conflicting interests of microwave incumbents and PCS licensees. Petitioners now seek to upset this balance -- without even the safeguard of Notice and Comment proceedings -- based only upon pure speculation about the supposed adverse impact of these requirements upon PCS licensees.

3. The procedures governing the relocation of microwave incumbents in the 2 GHz band to make way for PCS and other emerging technology licensees were established by

the Commission in ET Docket No. 92-9. Through three Notices of Proposed Rule Making, three Report and Orders and three Memorandum Opinion and Orders, the Commission developed, refined and further modified its detailed three-stage relocation process. In adopting the aforementioned prerequisites for an involuntary relocation and the corresponding amendment of an incumbent's license to secondary status, the Commission emphasized that its transition plan "will provide opportunity for the development of services using emerging technologies while preventing disruption of the service provided by the existing 2 GHz fixed microwave operations."<sup>2/</sup> Subsequently rejecting the proposal of PCS interests that all facilities be made secondary to emerging technology licensees on a fixed date, the Commission reaffirmed that such an approach "could unduly disrupt the existing 2 GHz services."<sup>3/</sup>

4. Petitioners now seek to turn this carefully-derived balance on its head. To this end, they complain

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<sup>2/</sup> First Report and Order and Third Notice of Proposed Rule Making, ET Docket No. 92-9, 7 FCC Rcd 6886 at ¶ 23 (adopted September 17, 1992).

<sup>3/</sup> Third Report and Order and Memorandum Opinion and Order, ET Docket No. 92-9, 8 FCC Rcd 6589 at ¶ 18 (adopted July 15, 1993).



that unless the Commission requires microwave incumbents to vacate the 2 GHz band immediately upon the expiration of the mandatory negotiation period or have their licenses amended to secondary status, incumbents will be able to "prolong negotiations beyond the end of the mandatory period"<sup>4/</sup> and "draw out the process far beyond the period anticipated by the Commission or PCS licensees when they were bidding at auction."<sup>5/</sup>

5. Petitioners' argument suffers from several fundamental defects. To begin with, as the involuntary relocation period for A and B block licensees will not begin until more than twenty months from now, any claim that the rules governing this phase are not working is quite premature. More importantly, Petitioners' apparent fears of incumbent abuses during the involuntary period are unfounded, as the steps necessary to initiate and complete an involuntary relocation rest primarily within the control of PCS licensees. As modified in the Order, the Commission's rules clearly define the categories of relocation expenses for which incumbents may obtain

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<sup>4/</sup> Petition at 3.

<sup>5/</sup> Id. at 4.

reimbursement and the type of "comparable facilities" that PCS licensees must provide.<sup>6/</sup> Accordingly, PCS licensees seeking a quick transition need only act promptly to satisfy the Commission's requirements. Incumbents will not be able to "prolong negotiations" into the involuntary period, as PCS licensees can simply set the involuntary relocation procedures in motion and walk away from the bargaining table.

6. Under the drastically revised relocation framework proposed by Petitioners, PCS licensees would have an overwhelming and unfair advantage in the negotiation and relocation processes. Indeed, if PCS licensees were automatically to obtain sole primary status upon the termination of the mandatory negotiation period, they would have little incentive to initiate and pay for the involuntary relocation of microwave incumbents. Only through continuing to require that incumbents receive comparable facilities before they must cede their primary status can the Commission ensure that incumbents will be

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<sup>6/</sup> In its Petition for Reconsideration, API challenged certain aspects of the Commission's revised involuntary relocation rules.

properly compensated for their forced transition from the 2 GHz band.

7. This requirement is hardly unfair to PCS licensees; they were fully aware of the Commission's relocation rules when they bid for and obtained their 2 GHz licenses. In fact, all interested parties have relied upon and shaped their behavior in accordance with the existing rules. An "about face" by the Commission at this point would make a mockery of the rule making process and would threaten the credibility of the Commission itself. Thus, Petitioners' latest efforts to erode the basic protections conferred upon microwave incumbents in ET Docket No. 92-9 cannot be entertained seriously and must be rejected.

8. Adoption of the changes sought by Petitioners not only would be unwarranted from a policy standpoint, but also would be clearly improper as a procedural matter. In their ex parte letter to the Commission of April 15, 1996, AT&T Wireless and six other PCS licensees raised the same issues that are now the subject of Petitioners' Petition for Reconsideration. In its Order, the Commission explicitly refused to address these issues because they "were not included in the *Cost-Sharing Notice*, nor were they raised in

any of the regularly filed comments or reply comments in this proceeding.<sup>7/</sup> The Commission also noted that the proper avenue for pursuing these issues would be through the filing of a Petition for Rule Making.<sup>8/</sup>

9. Petitioners recognize that no party proposed the specific changes requested in their Petition until the ex parte letter was filed on April 15 -- only 10 days prior to the Commission's adoption of the Order. Somewhat incredibly, however, Petitioners insist that "the general nature of the [Cost-Sharing] Notice and the scope of comment sought"<sup>9/</sup> put parties on notice of the changes proposed in the April 15 letter and provided them with ample opportunity to comment thereon. If that were the case, the Commission could routinely implement wide-sweeping changes, without the proper opportunity for notice and comment regarding the specific issues at hand, under the umbrella of a rule making proceeding involving an entirely different but related subject. Petitioners surely do not believe that the rule

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<sup>7/</sup> Order at ¶ 52.

<sup>8/</sup> Id.

<sup>9/</sup> Petition at 4.

making process is supposed to function in such a haphazard and inequitable manner.

10. Citing Section 1.429(b) of the Commission's rules, Petitioners also claim that "the Commission may address requests to reconsider issues not previously raised when it would be in the public interest."<sup>10/</sup> This is a wholesale misreading of Section 1.429(b), which provides only that the Commission may grant a petition for reconsideration that relies upon facts that have not previously been presented to the Commission where "consideration of the facts relied on is required in the public interest." Petitioners rely not upon new facts that have a bearing on issues properly raised, but upon issues that are not -- and have never been -- the subject of this proceeding.

11. In any event, there is absolutely no public interest rationale for substantially altering the relocation framework in the manner suggested by Petitioners, particularly without an opportunity for Notice and Comment. As the involuntary relocation period for the first group of PCS licensees will not begin until April 1998, there is more

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<sup>10/</sup> Id. at 3.

than ample time for any needed refinements in the Commission's involuntary relocation procedures to be adopted through the normal rule making process.

12. In sum, and as demonstrated above, API believes that Petitioners' purported concerns about the Commission's involuntary relocation procedures are speculative and unfounded. Should the Commission nonetheless conclude, however, that certain rule modifications are needed in this regard, API urges the Commission to adhere to its previous assessment that any such changes must be implemented through a proper rule making proceeding.

**B. The Commission Has Correctly Concluded That the Existence of Bad Faith During the Mandatory Negotiation Period Should Be Assessed on a Case-by-Case Basis**

13. Omnipoint asks the Commission to clarify that, during the mandatory negotiation period, "it is a bad faith request for the microwave incumbent to demand a cash windfall over and above all costs of relocation to comparable facilities."<sup>11/</sup> In support of its position that premiums must be directly related to relocation, Omnipoint

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<sup>11/</sup> Omnipoint Petition at 5.

cites the Commission's observation that, in the context of voluntary negotiations, "[p]remiums could include: replacing the analog facilities with digital facilities, paying all of the incumbent's transaction costs, or relocating an entire system as opposed to just the interfering links."<sup>12/</sup> As Omnipoint also points out, the Commission has stated that one of the factors it will consider in assessing claims of bad faith is whether the premium is directly related to relocation.<sup>13/</sup>

14. In its Order, the Commission correctly rejected the approach urged here by Omnipoint. Responding to the contentions of PCS entities that certain types of behavior are prima facie evidence of bad faith, the Commission found that "the question of whether parties are negotiating in good faith typically requires consideration of all the facts and circumstances underlying the negotiations, and thus is likely to depend on the specific facts in each case."<sup>14/</sup> Creating a presumption that a party is acting in good or bad faith, noted the Commission, "may slow down resolution of

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<sup>12/</sup> Id. (citing Order at ¶ 15).

<sup>13/</sup> Id. (citing Order at ¶ 21).

<sup>14/</sup> Order at ¶ 20.

disputes by prompting parties to bring claims of 'bad faith' to the Commission prematurely rather than focusing on resolving the underlying disputes through the negotiation process."<sup>15/</sup> Accordingly, the Commission concluded that good faith should be evaluated on a case-by-case basis.

15. As the Commission implicitly recognized in its Order, each microwave relocation is unique. Without delving into the circumstances surrounding a particular relocation, it is impossible to determine whether a request for cash payments not directly related to the costs of relocation to comparable facilities is appropriate. The Commission's relocation rules provide examples, without limitation, of types of premiums that may be requested; nowhere do they indicate that it would be improper or an act of bad faith to seek other types of premiums, including premiums that are not directly tied to relocation costs. Such a restriction would impose unnecessary constraints upon what is meant to be an open and unfettered opportunity for the parties to negotiate a mutually beneficial relocation agreement.

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<sup>15/</sup> Id.



16. If a PCS licensee is unwilling to provide cash payments, it need only reject the microwave incumbent's request therefor. Any such requests that threaten in bad faith to undermine or sabotage the negotiation process can be brought to the Commission's attention and assessed in light of the relevant considerations that the Commission has identified.

**WHEREFORE, THE PREMISES CONSIDERED,** the American Petroleum Institute respectfully submits the foregoing Opposition and urges the Federal Communications Commission to act in a manner fully consistent with the views expressed herein.

Respectfully submitted,

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Dated: August 8, 1996

**CERTIFICATE OF SERVICE**

I, Patt Meyer, a secretary in the law firm of Keller and Heckman, do hereby certify that a copy of the foregoing OPPOSITION OF THE AMERICAN PETROLEUM INSTITUTE TO CERTAIN PETITIONS FOR RECONSIDERATION, CLARIFICATION AND/OR RULE MAKING has been served this 8th day of August, 1996 by mailing U.S. First-Class, postage prepaid, to the following:

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